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David Frisch

University of Richmond, dfrisch@richmond.edu

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AN APPRAISAL OF THE MARCH 1, 1990, PRELIMINARY REPORT OF THE UNIFORM COMMERCIAL CODE ARTICLE 2 STUDY GROUP

PREPARED BY A TASK FORCE OF THE A.B.A.
SUBCOMMITTEE ON GENERAL PROVISIONS, SALES,
BULK TRANSFERS, AND DOCUMENTS OF TITLE,
COMMITTEE ON THE UNIFORM COMMERCIAL CODE*

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* The members of the Task Force who participated in the preparation of this Appraisal were Roy Ryden Anderson, Roger D. Billings, Jr., Donald F. Clifford, Jr., David Frisch, Henry Gabriel, Gregory Gelfand, Mark E. Roszkowski, Peter Winship, and John Wladis. As a member of the Task Force, Professor Winship prepared a memorandum on the relevance of the U.N. Convention on Contracts for the International Sale of Goods, for the revision of Article 2. This memorandum is not reproduced here.

This article represents a consolidation of the Article 2 Study Group's Preliminary Report and the A.B.A. Task Force's Appraisal of the Study Group's Preliminary Report.

The Study Group's Preliminary Report and the appendices to the Task Force's Appraisal are unedited and reprinted in full. The Study Group's Preliminary Report is presented in italics, and bold typeface is used to emphasize the Study Group's recommendations.

The Study Group's remarks concerning each U.C.C. section are followed by the corresponding remarks from the Task Force's Appraisal. Each part of the Study Group's Preliminary Report contains an independent series of footnotes commencing with the number "1." The Task Force's Appraisal contains one continuous series of footnotes.

Please note that the Study Group is occasionally referred to as the "Study Committee" in the Study Group's Preliminary Report.

** Table of Contents references are to the A.B.A. Task Force's Appraisal. U.C.C. sections italicized in the Table of Contents are exclusively discussed in the Study Group's Preliminary Report, and the corresponding page numbers refer to the Preliminary Report.

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PREFACE

In the spring of 1988, the Permanent Editorial Board for the Uniform Commercial Code, with the approval of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, began a formal study of Article 2 with the goal of reaching a decision as to whether the text should be revised. To this end, a Study Group was appointed, and Professor Richard E. Speidel of Northwestern University was selected to serve as Project Director.¹ On March 1, 1990, after two years of study, the Study Group issued a 245-page preliminary report for general public discussion and consideration.²

The Business Law Section of the American Bar Association has long played an important role in the evolutionary development of the Uniform Commercial Code. Since 1947 it has, through its divisions and committees, carefully studied each draft as it was produced, ex-

¹ See Speidel, *Committee Studies Revising U.C.C. Article 2*, 8 Bus. Law. Update 3 (1988) (No. 6) (discussing the Article 2 Study).

² An Executive Summary was issued by the Study Group on March 1, 1991. On August 6, 1991, the National Conference of Commissioners on Uniform State Laws authorized the creation of an Article 2 Drafting Committee and the appointment of a Reporter.

pressed opinions on policy matters, and made suggestions for improvements. Continuing this tradition of participation, the Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title of the Committee on the Uniform Commercial Code undertook the task of formulating conclusions with respect to the Preliminary Report. The work of the Subcommittee began in May 1990 with the assemblage of a ten-member Task Force. What follows is the report of that task force.

In the preparation of its report, the Task Force sought to consider not only the substantive content of the Study Group's section-by-section recommendations, but also more pervasive matters such as the scope and approach of the Preliminary Report. Although not all members of the Task Force share the Study Group's implicit viewpoint that revision is due for Article 2, the prevalent opinion is that the bulk of the Study Group's recommendations are sound and that revision is desirable. Other subcommittees of the Uniform Commercial Code Committee of the American Bar Association have also conducted studies of the Preliminary Report, and their reports should be looked to for more particularized views of the Preliminary Report.

David Frisch, Chair
Subcommittee on General Pro-
visions, Sales, Bulk Transfers,
and Documents of Title

NOTE: The opinions and conclusions expressed in the Task Force Report were not submitted to any body for approval. The Report does not necessarily reflect the opinion of the full Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, the Uniform Commercial Code Committee, the Business Law Section, or the American Bar Association.

*[PRELIMINARY REPORT - INTRODUCTION]***ARTICLE 2, SALES:
HISTORY, DRAFTING AND BASIC POLICIES****A. A BRIEF LEGISLATIVE HISTORY OF ARTICLE 2.**

The British Sale of Goods Act, enacted by Parliament in 1893,¹ was used by Professor Samuel Williston as a model for the Uniform Sales Act (USA), which was promulgated in 1906. The USA was ultimately enacted in 34 states, the last enactment occurring in 1941.² Grant Gilmore, writing in 1948, described the USA as a "scholarly reconstruction of 19th Century law" which, in 1906, "failed to move the law much closer to us than 1850."³ It was, in short, a prime example of what he and others have called "classical" contract law.

In 1937, the Federal Sales Bill (The Chandler Bill), which was sponsored by the New York City Merchant's Association and other commercial groups, was drafted.⁴ The Bill, which was based on the USA, was introduced in Congress in 1937 but never enacted.

The first drafts of a revised Uniform Sales Act were completed in 1940.⁵ These early efforts culminated in 1944 with a proposed Uniform Revised Sales Act.⁶ The 1944 Draft was a joint project of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. Karl N. Llewellyn was the Reporter and Soia Mentschikoff

1. Discussions of English sales law prior to 1893 are found in Llewellyn, *Across Sales on Horseback*, 52 Harv. L. Rev. 725 (1939); Stone, *The Origins of the Law of Sales*, 29 L.Q. Rev. 442 (1913).

2. See Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 798, 799 (1958) (hereinafter Braucher, *Legislative History*).

3. Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 Yale L. J. 1341, 1341-42 (1948). According to Gilmore, the USA failed because it neglected to "clarify the law about business transactions" that in fact occurred. *Id.* According to Karl N. Llewellyn, the USA was "obscure," "uncertain," "misleading," too "technical" and contained numerous "traps" for the ordinary businessman acting in good faith. See Llewellyn, *Article 2, A Brief Opening Statement in Favor of the Article*, N.Y. Law Rev. Commission, *Study of the Uniform Commercial Code* 5 (1954).

4. The Bill is reprinted as H.R. 8176 (1940), in I Kelly, *Uniform Commercial Code Drafts* 113-69 (1984) (hereinafter Kelly). The Kelly volumes include drafts of the UCC issued by the American Law Institute and the National Conference of Commissioners on Uniform State Laws from 1940-62. See also Symposium, *The Proposed Federal Sales Act*, 26 Va. L. Rev. 537 (1940).

5. See I Kelly at 174-260.

6. The 1944 Draft with extensive commentary is reprinted in II Kelly 1-79, 80-278.

was the Associate Reporter for the 1944 draft and for much of the work that followed.

By 1949, there was a first draft of a proposed Uniform Commercial Code with comments. In the 1949 Draft, Article 2, Sales, was a further revision of the Uniform Revised Sales Act.⁷ In May, 1950, a "Final Draft" of the UCC, with Text and Comments, was proposed.⁸ But in September, 1950, further revisions in Article 2 were recommended and the work continued. A Proposed "text only" Final Draft #2 was then issued in the Spring of 1951⁹ and an Official Draft with Comments was issued later that year.¹⁰ Text changes in this draft were proposed by the recently created Editorial Board for the UCC (EB), and the 1952 Official Draft, with changes, was finally promulgated as the 1953 Official Text.¹¹ The 1953 Official Text of the UCC was enacted by Pennsylvania in April 1953, effective on July 1, 1954.¹² In response to a recommendation by the Association of the Bar of the City of New York,¹³ the New York Law Revision Commission held extensive hearings on the UCC in 1954. A detailed report of their analysis and conclusions was issued in 1955,¹⁴ and a condensed report and recommendation was submitted to the New York General Assembly in 1956. The conclusions were critical of the 1953 Official Draft of the UCC,¹⁵ including Article 2.¹⁶ The New York Report prompted the EB to review earlier

7. See VI Kelly 47-263.

8. Article 2 of that Draft is reprinted in X Kelly 351-56. The proposed drafts of Article 2 in 1949 and 1950 were the subject of Professor Williston's famous attack, Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv. L. Rev. 561 (1950), and Professor Corbin's spirited defense, Corbin, *The Uniform Commercial Code-Sales: Should it be Enacted?*, 59 Yale L.J. 821 (1950).

9. See XII Kelly 416-83.

10. XIV Kelly 43-174.

11. XVI Kelly 55-264.

12. Pa. Stat. Ann. tit. 12A (1954).

13. XV Kelly 307-42.

14. See New York Law Revision Commission Report for 1955, *Study of the Uniform Commercial Code* (1955)(hereinafter Report)

15. Two conclusions of the Report were that the UCC was "not satisfactory in its present form" and that it "cannot be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable." Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code, Leg. Doc. 65A, 57-8 (1956). See also, Braucher, *Legislative History* at 803-04.

16. See Report of the Law Revision Commission to the Legislature at 40-46. According to William Schnader, the Commission discussed 40 of Article 2's 102 sections. Of these 22 were approved, 13 were criticized but none was disapproved. More importantly, the Commission approved the five main features of Article 2, namely: (1) Abandonment of title as a test for determining legal obligations; (2) The distinction between merchant and non-merchant sellers and buyers; (3) Relaxation of the statute of frauds; (4) New provisions dealing with rules of construction or the implication of particular terms; and (5) Significant

recommendations for change in the 1953 Text of Article 2¹⁷ and to recommend further revisions in 1956.¹⁸ These second thoughts lead to the promulgation of the 1958 Official Text with Comments¹⁹ and the ultimate enactment of the complete UCC by every state except Louisiana.²⁰

Although other Articles of the UCC have been revised since 1958²¹ and a new Article 2A, Article 4A and Article 6 have been promulgated, the Official Text of Article 2 remains fundamentally the same.²² In the Spring of 1988, however, the Permanent Editorial Board²³ and the American Law Institute, in conjunction with the National Conference of Commissioners on Uniform State Laws, approved a Study to consider whether Article 2 should be revised and, if so, to report on what revisions might be required. The charge to the Study Group was to identify "major problems of practical importance" in the interpretation and application of Article 2.²⁴ The Study also provides an opportunity to consider whether Article 2 is drafted as a coherent whole and contains the internal unity necessary to support its underlying policies and to achieve harmony with other Articles in the UCC.²⁵

B. DRAFTING ARTICLE 2: UNDERLYING POLICIES.

1. Drafting Dilemmas.

Grant Gilmore argued that the purpose of general commercial legislation should be to "clarify the law about business transactions rather than change

changes in remedies. See Symposium, Panel Discussion of the UCC-Report of the New York Law Revision Commission-Areas of Agreement and Disagreement, 12 Bus. Law. 49, 51 (1956). For a more focused discussion of the Commission's conclusions on Article 2, see Pasley, *Id.* at 59-60.

17. These recommendations, proposed in 1955, are reprinted in XVII Kelly 323-32. See also, *Id.* at 414-25.

18. XVIII Kelly 43-110.

19. XX Kelly 346 et seq.

20. Louisiana has now enacted all of the UCC except Articles 2, 2A and 6.

21. The main revisions were of Article 9 in 1972 and Article 8 in 1978. A revision of Articles 3 and 4 is scheduled for completion in 1990.

22. In 1966, § 2-702(3) was revised to delete the phrase "or lien creditor." In 1972, § 2-107(1) was revised to include "oil and gas" within the definition of minerals and § 2-107(2) was revised to add the phrase "or of timber to be cut." More recently, the PEB has published "commentary" on particular provisions, which is designed to clarify recurring disputes over proper interpretation.

23. The Editorial Board of the Uniform Commercial Code became the Permanent Editorial Board (PEB) in 1961.

24. For an excellent analysis, see Leary & Frisch, *Is Revision Due for Article 2*, 31 Vill. L. Rev. 399 (1986)(hereinafter *Revision*).

25. Professor (now Justice) Ellen Peters, writing in 1963, raised important questions about the coherence and unity of Article 2. In particular, she questioned the consistency between the sections dealing with performance of the contract and those dealing with remedies. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the UCC: A Roadmap for Article 2*, 73 Yale L.J. 199, 200-04 (1963)(hereinafter *Roadmap*).

the habits of the business community" and that the principal object of a draftsman is to be "accurate and not to be original."²⁶ Let us accept this as a working principle, even though we may deviate upon occasion. Since clarification and accuracy presuppose some knowledge about business "habits", two important dilemmas were posed for the drafters of Article 2.

First, it is hard to be accurate without knowledge of relevant practices. At the inception of Article 2 there was no fund of data systematically gathered to inform the drafters. Moreover, access to such data is complicated by the variety of contexts within which goods are sold and the different functions performed by sellers and buyers. One could expect different habits depending on whether the goods sold are race horses or computer software or natural gas or clothing or new automobiles or factory equipment or whether the seller is a jobber rather than a manufacturer or whether the buyer purchases for commercial consumption or resale or consumer consumption. In these overlapping contexts, actual business practices are difficult to identify and quantify, much less to evaluate.

Second, there are some "habits" of the business community that may need changing. Granted, the law of crimes, torts, antitrust, unfair competition and fraud is there to deter and punish egregious misconduct. Should, then, a commercial statute be concerned about bad habits that fall between the cracks and, if so, how does one determine what is bad and what remedies are appropriate? The question has particular relevance for disputes where the buyer is a consumer, i.e., an individual who purchases for personal, family or household purposes.

In the paragraphs to follow, we will briefly (1) examine how these drafting dilemmas were resolved in the 1958 Official Text of Article 2 and (2) recommend how a Drafting Committee might proceed in the revision of Article 2.

2. Underlying Policies.

Article 2, Sales, deals primarily with contracts for the sale of goods. Article 2 may cover other transactions in goods, either directly or by analogy, but the primary transaction is the sale.²⁷

Within this transactional limitation, Article 2, aided by the general definitions and provisions of Article 1, avoids the first drafting dilemma by utilizing flexible standards, such as commercial reasonableness and good

26. Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *Yale L.J.* 1341, 1341-42 (1948).

27. See § 2-106(1), which states that in Article 2 "unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods."

*faith, rather than rules that purport to capture and solidify prevailing practices and norms. Each dispute between a seller and buyer is placed in its functional setting where the parties are expected to find and prove relevant "habits," i.e., trade usage or practices, as part of the agreement.*²⁸ *Under these standards, the court is given flexibility (at some cost to certainty and administrability) to resolve the new or unique dispute. Moreover, standards are thought to reduce the gap between law and practice and to insure that decisions are practical and responsive to the needs, proven in the particular case, of the parties and the relevant business community.*²⁹

*In addition to this emphasis upon standards and the rejection of "title" as a problem solving concept,*³⁰ *several other basic policies underlie the drafting approach in Article 2.*

(a) *Broad Scope and Effect of Agreement.*

*An underlying purpose of the UCC is to "permit the continued expansion of commercial practices through custom, usage and agreement of the parties. . . ." § 1-102(2)(b). This purpose*³¹ *is implemented, in part, by a broad definition of agreement in § 1-201(3), and the delegation to the parties of power, albeit limited, to choose which state's version of Article 2 applies, § 1-105(1), and to vary "the effect of provisions of this Act. . . by agreement. . . ." § 1-102(3).*

*These provisions, supplemented by § 1-205, entitled "Course of Dealing and Usage of Trade," are relevant to a wide range of issues of liability and remedy arising under Article 2.*³² *Thus, under Article 2, the expandible*

28. See § 1-201(3). Peters states, for example, that the performance obligation is stated in "terms of operative facts rather than legal conclusions." The emphasis is upon actual, provable circumstances within the control of the parties rather than upon rules within the control of the courts. Roadmap at 202.

29. Cf. Eisenberg, *The Responsive Model of Contract Law*, 36 Stan. L. Rev. 1107, 1109 (1984), who asserts that "law is. . . a purposive institution whose principles and theories are normative and prescriptive. . . [and that] contract is a social institution before it is a legal institution, and the rules of contract law must respond to the social institution, not to autonomous legal conventions."

30. § 2-401.

31. Section 1-102(1) provides that this "Act shall be liberally construed and applied to promote its underlying purposes and policies" and then, in § 1-102(2), states what those purposes and policies are.

32. Whether the agreement of the parties is in law a contract for sale is a separate question. See § 1-201(11), where "contract" is defined to mean the "total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." Cf. § 2-106(1)(defining the scope of the phrase "contract for sale").

agreement of the parties, i.e., the "bargain in fact," rather than the promise provides the foundation stone of the transaction.³³

One important consequence of this approach is that values and norms which are "imminent" in the relevant context may be extracted and applied by the court, whether they emerge in determining the agreement in fact of the parties or in filling "gaps" in that agreement.³⁴ In theory, at least, differences created by the types of goods sold and the economic roles played by the seller and buyer should emerge in the litigation process.

(b) *Application of Standards in the Absence of Agreement: "Gap" Filling.*

Article 2 may impose obligations on parties whose agreement is incomplete or omits material terms. There are no rules of offer and acceptance that state how much agreement must be reached before a contract exists. Rather, Article 2 provides flexible standards that depend upon (a) what the parties intended or (b) what they would have intended if they had considered it (the so-called "hypothetical" bargain.)

The "intention" test is illustrated by § 2-204(3), which provides that "even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Conduct by both parties which "recognizes the existence of such a contract" is the best evidence of intention. § 2-204(1). See § 2-207(3). If the requisite intention to conclude the bargain is not present, however, no contract is formed. Compare § 2-305(4). If the requisite intention is present, enforceability depends upon the certainty of the agreement. This, in turn, depends upon relevant facts derived from the commercial context.

The "hypothetical" bargain is illustrated by the provisions in Article 2, Part 3.³⁵ If the parties have intended to contract but have not agreed upon a particular term, the court is invited to supply a "reasonable" term to fill the "gap." Thus, if the price was not agreed, the parties are bound by a "reasonable price at the time for delivery." § 2-305(1).³⁶ The

33. See, e.g., Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 Washburn L. J. 1 (1981); Mooney, *Old Contract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 Vill. L. Rev. 213 (1966).

34. See Danzig, *Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan. L. Rev. 621 (1975). See also, Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 Wm & Mary L. Rev. 341 (1988).

35. See also § 1-204, which concerns the requirement of "reasonable" time.

36. If a reasonable price is not established, the contract fails for indefiniteness. § 2-204(3).

assumption here is that the appropriate norms, i.e., the "situation sense," can be derived from the surrounding commercial context.³⁷ Consistency with a consent based theory is maintained by assuming that the "off the rack" terms would have been agreed to if considered by the parties.³⁸

(c) The "Merchant" Standards.

With few exceptions, Article 2 does not differentiate between sellers and buyers, whether they are in commercial or consumer transactions. That exception concerns transactions involving or "between"³⁹ "merchants," as that person is defined in § 2-104(1). In these situations, different or higher standards bind the merchant than those applicable to others. For example, only a merchant seller can make a firm offer, § 2-205, or an implied warranty of merchantability, § 2-314(1). In addition, merchants have a higher duty of good faith, § 2-103(1)(b), and greater power to pass good title § 2-403(2), and may ignore certain writings at their peril, §§ 2-201(2) & 2-207(2).

The "merchant" standards, which are limited to Article 2, have been subjected to extensive analysis and evaluation.⁴⁰ Despite questions about their origins and effect, they reflect a common sense judgment about the responsibilities of persons involved in commerce. As one commentator put it, "it may be said that what's good for businessmen in Article 2 is good for the rest of us."⁴¹ Nevertheless, one can question whether this endorsement should apply to consumers or whether the "merchant" standards should be applied to other articles of the UCC.

37. See Gedic, *supra* Note 34 at 361-71, discussing Llewellyn's approach to commercial law. See also, Restatement, Second, Contracts § 204 which provides: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

38. But see Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L. J. 87 (1989)(questioning conventional justifications for "gap filling").

39. See § 2-104(3).

40. See, e.g., Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 Harv. L. Rev. 465 (1987)(arguing that because Llewellyn did not accomplish all that he intended in the drafting process, the "merchant" rules in Article 2 emerged in a patchwork and sometimes incoherent fashion).

41. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True and the Beautiful in Commercial Law*, 73 Geo. L.J. 1141, 1176-80 (1985).

(d) *Legal Controls on the Agreement: Unconscionability and Good Faith.*

Two important limitations upon the "bargain in fact" are the requirement that a contract or clause not be unconscionable "at the time it was made," § 2-302(1), and the imposition of an obligation of good faith on the "performance or enforcement" of every contract or duty with the UCC. § 1-203.

The conscionability requirement is imposed by and apparently limited to Article 2. It operates, primarily, at the time of contracting⁴² to protect one party from bargaining abuses that are not otherwise regulated by the doctrines of fraud, duress or mistake. Despite early criticism of § 2-302,⁴³ the courts have exercised restraint in identifying what has been called "procedural" unconscionability⁴⁴ in both consumer and commercial transactions.⁴⁵

The duty of good faith is imposed in Article 1, see § 1-203, and is elaborated in Article 2 through a higher, objective standard of good faith for merchants. § 2-103(1)(b). It operates, primarily, after the contract has been formed. Despite acceptance of the duty in general contract law,⁴⁶ there is continuing disagreement about such questions as the scope of duty, what conduct constitutes bad faith and the remedies that are available when bad faith is established.⁴⁷

Despite their statutory origins, both limitations now find wide acceptance in general contract law.

Rec. Int. (1)

The Study Group endorses the drafting style utilized in Article 2 and recommends that the general sales policies, discussed above,

42. But see Kniffin, *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, 63 *Notre Dame L. Rev.* 247 (1988)(court should consider effect of agreed remedy at time of breach).

43. A classic critical article is Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 *U. Pa. L. Rev.* 485 (1967). For more balanced assessments, see Ellinghaus, *In Defense of Unconscionability*, 78 *Yale L. J.* 757 (1967); Spanogle, *Analyzing Unconscionability Problems*, 117 *U. Pa. L. Rev.* 931 (1969). See also, Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 *Cornell L. Rev.* 1 (1981).

44. See Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J. Law & Econ.* 293, 315 (1975)(distinguishing between defects in the process of contract formation ("procedural") and complaints about the substance of the terms included in the apparent bargain ("substantive")).

45. See Mallor, *Unconscionability in Contracts Between Merchants*, 40 *Sw. L.J.* 1065 (1986).

46. See *Restatement, Second, Contracts* § 205.

47. An important article is Summers, *Good Faith in General Contract Law and the Sales Provisions of the UCC*, 54 *Va. L. Rev.* 195 (1968). For a recent application, see Andersen, *Good Faith in the Enforcement of Contracts*, 73 *Iowa L. Rev.* 299 (1988).

be retained. There is little evidence that these policies have interfered with commerce by creating an unacceptable level of uncertainty for the parties or administrative costs for the courts. Rather, the policies appear to establish a commendable balance between facilitation (efficiency) and regulation (fairness) in contracts for sale where neither party is a consumer. Above all, they delegate power to the parties to fashion their own agreement.

We recommend that the Drafting Committee consider ways beyond those recommended by the Study Group to articulate these policies and to improve their implementation. The objective is to achieve a more complete utilization of them by the parties and the courts in the resolution of commercial disputes.

C. CONSUMER PROTECTION.

A second drafting dilemma concerns the extent to which a commercial statute should attempt to deter or alter the conduct of persons engaged in a trade or of parties to the contract for sale. The Article 2 solution is to invoke general standards to reject commercially unreasonable practices,⁴⁸ avoid unconscionable contracts or clauses and treat bad faith performance or enforcement as a breach of contract regardless of who the parties are. Beyond that, Article 2 is neutral when direct issues of regulation are posed. There are no special provisions designed to provide protection to a consumer buyer in transactions with a merchant seller.⁴⁹ Rather, § 2-102 simply provides that Article 2 does not impair or repeal "any statute regulating sales to consumers, farmers or other specified classes of buyers."

Since the 1958 Official Text was approved, there have been numerous important developments in consumer protection on both the federal and state level. They include the increased regulation of both credit and sales practices, as well as the content of the consumer contract for sale and the growth of state "little" FTC Acts which are invoked in both consumer and commercial transactions.⁵⁰ There are, however, noticeable gaps in coverage where Congress

48. See Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the UCC*, 30 U. Chi. L. Rev. 666 (1963).

49. § 2-103(3) incorporates for Article 2 the definition of "consumer goods" found in § 9-109(1). § 2-719(3), dealing with the validity of clauses limiting consequential damages "for injury to the person in the case of consumer goods," is the only substantive section of Article 2 that mentions consumer goods.

50. See, generally, Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 Hous. L. Rev. 575 (1989); Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 Ohio St. L.J.

or the FTC has failed to go far enough and other state legislation is incomplete or non-existent. For example, many states either have failed to enact comprehensive consumer protection legislation or have enacted legislation, such as the "lemon" laws, that does not fill the gaps in coverage under the Magnuson-Moss Warranty Act. This result has been criticised by some commentators.⁵¹

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Despite these gaps in coverage and the decision in Article 2A to provide special protection in some cases to consumer lessees,⁵² the Study Group makes the following recommendations to the Drafting Committee:

(A) The revised Article 2 should neither incorporate more comprehensive consumer protection legislation than already enacted apart from the UCC nor contain new sections specially drafted to fill apparent gaps. The responsibility for enacting comprehensive consumer protection legislation should be located outside of the scope of general commercial legislation;

(B) The Drafting Committee should consider whether the limited, special consumer protection provisions in Article 2A are appropriate for inclusion in a revised Article 2;

(C) The Study Group, in the Report to follow, will consider whether limited affirmative rules for consumers are appropriate in certain areas now covered by Article 2, e.g., the scope of warranties, disclaimers and limited remedies or the content of unconscionability and good faith, and make recommendations to the Drafting Committee;

(D) Section 2-102 should be revised to state that subject to any statute or decision which establishes a different rule for seller or

815 (1987); Blumberg, *Consumer Protection in the United States: Control of Unfair or Unconscionable Practices*, 34 *Am. J. Comp. L.* 99 (Supp. 1986); Coffinberger & Samuels, *Legislative Responses to the Plight of New Car Purchasers*, 18 *U.C.C. L.J.* 168 (1985); Note, *Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry*, 74 *Calif. L. Rev.* 2101 (1986); Note, *Revising the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 *UCLA L. Rev.* 940 (1986).

51. See generally, Rice, *Product Quality Laws and the Economics of Federalism*, 65 *B.U.L. Rev.* 1 (1985).

52. See Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 *Ala. L. Rev.* 957 (1988). Article 2A contains a "limited" number of express consumer protection provisions. *Id.* at 964-74.

*buyers of consumer goods, the provisions of Article 2 shall apply.*⁵³

[TASK FORCE - INTRODUCTION]

I. REVISION OR CLARIFICATION THROUGH THE USE OF CODE COMMENTS

The Preliminary Report is replete with instances where revision or clarification of Uniform Commercial Code ("Code") Comments is the recommended method for solving a particular Code problem. The Task Force strongly believes that an attempt must be made to formulate and apply a workable standard for determining when it is appropriate to proceed by redrafting the commentary and when the revision or clarification should be reflected in the language of the statute itself. Admittedly, the formulation of the requisite standard is not an easy matter.

The function of the Comments as conceived by Professor Llewellyn was to assist the courts in their application of the Code by providing an authoritative guide to the purposes and reasons for each section. To what extent the Comments have, in fact, influenced decision-making is far from clear. Part of the difficulty stems from the divergent opinions surrounding their use and authoritativeness. Despite the frequently encountered view that the Comments are persuasive but not binding,¹ it is not unusual to find that they were not followed in a case either because it was thought that their application would lead to an inappropriate result,² or would effectively vary the plain language of the statute.³ Consider also the situation in Colorado where a statute provides that "[t]he inclusion of said nonstatutory matter [the Comments] shall be for the purpose of information and no implication or presumption of legislative intent shall be drawn therefrom."⁴

A further complication results from the failure of many courts to state with a sufficient degree of clarity why a particular Comment is or is not being followed. Consequently, it may be difficult to

53. Cf. § 2A-104, which states to types of statutes to which a lease might be subject and provides a rule to determine which statute controls in the event of conflict.

1 See, e.g., *Bickett v. W.R. Grace & Co.*, 12 U.C.C. Rep. Serv. (Calaghan) 629, 642 (W.D. Ky. 1972).

2 See, e.g., *Consolidated Film Indus. v. United States*, 547 F. 2d 533, 536-37 (10th Cir. 1977).

3 See, e.g., *Wright v. Bank of Cal.*, 276 Cal. App. 2d 485, 490, 81 Cal. Rptr. 11, 14 (1969).

4 COLO. REV. STAT. § 2-5-102(4) (1989).

tell how that very same court will treat the Comments in the future.

Accordingly, legislation by comment may or may not bring about the changes and clarifications recommended by the Study Group. The indiscriminate use of the Comments as a tool of change militates against uniformity and therefore should be abandoned. In his fine article on the Comments, Professor Skilton observed that they may be "(1) expository—seeking to describe the meaning and application of a section of the Code and its relationship with other sections, (2) gap-filling—seeking to suggest answers to questions not precisely covered by the text, or (3) promotional and argumentative—seeking to 'sell' a controversial section."⁵

It is the second mentioned function of the Comments which has the potential to cause the most difficulty. To borrow again from Professor Skilton, "[w]e cannot ask the comments to do the work that should be done by the text."⁶ It seems that if disagreement on a particular point would be harmful to the uniform application of the Code, that point should be dealt with in the text. It makes no sense, for example, to define a term in the Comments if, as a result, that definition is ignored or modified by the courts.

At least one Task Force member believes that nothing should be done by way of comment unless the accompanying text is also being changed. As he sees it, comments clarify the author's meaning in the accompanying text; consequently, it is not proper to write any comments at this time to explain which text is not also being modified. Thus, the key is not to find a workable distinction between "clarifications" and "substantive changes," presumably allowing the former to be done by new comments on the old text. Such a distinction will prove elusive at best. However, where new statutory text is being added, clarifications of the new parts may be made by comment.

For these reasons, the Task Force strongly believes that a more cautious approach to the Comments is needed.

II. THE SUBSTANTIVE COVERAGE OF ARTICLE 2

The need to reconsider the scope of Article 2 is a theme that has pervaded the dialogue of revision. In particular, with the

⁵ Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 608.

⁶ *Id.* at 614.

promulgation of Article 2A, the common perception of the scope problem now centers around the extent to which Article 2 should apply to contracts with a service component.⁷

The Study Group apparently includes in that category the incredible panoply of problems flowing from the explosion of computer technology, but leaves the distinct impression in a footnote that those issues should be left to a different Study Group already created under different auspices.⁸ It is difficult to see how an Article 2 revision could successfully finesse the issues in that way. No matter what emanates, if anything, from the other work, many computer-related transactions will still so affect sales matters as to necessitate some application of Article 2. The issues are too inter-related and important not to be considered in any revision of Article 2.

The Study Group Report's focus on existing sections also lacks any inquiry into such matters as including within a new Article 2 those areas of contract law on which the Code is presently silent.

In preparing this appraisal, the issue of coverage was approached from two angles. First, an attempt was made to form some general impressions about the extent to which courts have relied on certain non-Code doctrines in deciding cases involving the sale of goods. The second angle involved the question of whether the information learned would help explain why some pre-Code doctrines were codified and others were not. Therefore, the subjects selected for this informal empirical study were doctrines which are closely related to existing Code doctrines. They include the law of contract beneficiaries, mistake, and frustration of purpose. The frequency of application of each doctrine was determined by reference to judicial citation of Restatement sections found in the appendices to the Restatement (Second) of Contracts.

The initial choice for inclusion in this study was the third-party beneficiary doctrine. This was particularly attractive because the Code not only contains provisions pertaining to a conceptually related doctrine,⁹ but does in fact deal with some aspects of the

7 See U.C.C. § 2-102 (1990) (stating that the scope of Article 2 applies only to transactions in goods).

8 Prelim. Rpt., Part 1 n.5 and accompanying text, *infra* p. 1010.

9 The law of assignments also deals with the rights of third persons who were not parties to the original contract. But unlike the third-party beneficiary, the assignee acquires its rights subsequent to the contract's formation. See, e.g., U.C.C. §§ 2-210 & 9-318 (1990).

beneficiary problem. For example, section 2-318 offers three alternative approaches to the extension of warranty liability to third parties, and section 2-210 touches on the enforceability of an assignee's promise to perform the assignor's duties.¹⁰ According to this study, there were no less than 19 sales cases that cited one or more sections of the Restatement or Restatement (Second) for an aspect of third-party beneficiary law on which the Code is silent.¹¹

Although the Code explicitly recognizes the doctrine of impracticability of performance,¹² it says nothing of the doctrine of frustration of purpose although the two share a common conceptual base, that is, both deal with erroneous forecasts of the future. In twelve instances, frustration was argued in a sale of goods case with citation to either the First or Second Restatement.

Of greater quantitative significance is the doctrine of mistake. Mistake is characterized as a related doctrine because it, too, qualifies or excuses performance on the ground that one or both parties erred in their assumptions. In all, there were seventeen cases in which this doctrine was referred to.

These findings about the frequency of citation to the Restatements and non-Code law are not surprising. Both as a practical and a political matter, the coverage of the Code must be limited to some degree. It is inevitable, therefore, that contract litigation will occasionally implicate law that is external to the Code. This is not meant to suggest, however, that the choices made are inconsequential. To the extent that outside law is controlling, the goals of the Code are jeopardized. For example, the exclusion of mistake from the Code leaves (as this empirical survey suggests) a substantial gap in the Code's coverage of the law of mistaken assumptions. This is especially troubling where the gap must be filled by unpredictable law that is subject to competing tensions—the desire for commercial stability and sympathy for a mistaken

10 See U.C.C. § 2-210(4) (1990).

11 See, e.g., *United States v. Pall Corp.*, 367 F. Supp. 976, 980 (E.D.N.Y. 1973) (citing RESTATEMENT OF CONTRACTS § 133 (1932) for the general rule that a person may claim as a third party beneficiary if the performance of a promise will satisfy a duty of the promisee to the beneficiary); *United States v. Glassman Constr. Co.*, 266 F. Supp. 110, 115 (D. Md. 1967) (citing RESTATEMENT OF CONTRACTS § 140 for the proposition that a third party beneficiary can acquire greater rights against a promisor than the promisee).

12 See U.C.C. § 2-615 (1990).

contract party.¹³ Furthermore, the potential for confusion is further exacerbated by the inherent indeterminacy of U.C.C. section 1-103.¹⁴

It is not suggested that the law of mistake or any other particular doctrine should be added to a revised Article 2. The point is rather that greater attention should be paid to how complete a statement the Code should make on the law of sales, and that the volume of cases involving non-Code law is a source of useful information in this regard. It remains to be determined, however, how heavily this information should be weighed. The fact is that having this information would strengthen whatever decisions are ultimately made.

III. CONSUMER CONSIDERATIONS

A. *The Recommendations Regarding Consumer Provisions*

There is a degree of ambivalence about the Study Group's recommendations pertaining to consumers. On the one hand, there is a clear attempt to declare neutrality. This begins with the assessment that the general policies of Article 2 "establish a commendable balance between facilitation (efficiency) and regulation (fairness) in contracts for sale *where neither party is a consumer*."¹⁵ It continues with the recommendation that "[t]he revised Article 2 should neither incorporate more comprehensive consumer protection legislation than already enacted apart from the UCC nor contain new sections specially drafted to fill apparent gaps. The responsibility for enacting comprehensive consumer protection legislation should be located outside of the scope of general commercial legislation."¹⁶

On the other hand, the Report, early on, acknowledges "numerous important developments in consumer protection on both

13 Newman, *Relief for Mistake in Contracting*, 54 CORNELL L. REV. 232, 237 (1969). The risk of inconsistent decisions in this area is due in part to the dichotomy in Anglo-American law between the desire for stability of commercial transactions on the one hand, and concern over the unfairness of enforcing a contract against a party who lacked complete information regarding all the relevant circumstances. *Id.* at 236-37. This problem of inconsistency is compounded by the fact that the Second Restatement contains a significantly different articulation of the doctrine than that contained in the first.

14 See *infra* pp. 1010-12 and text accompanying notes 48-51.

15 Prelim. Rpt., Introduction, Rec. Int. (1), *supra* p. 993-94 (emphasis added).

16 Prelim. Rpt., Introduction, Rec. Int. (2)(A), *supra* p. 995.